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Tsoi Ping Kwan v Loh Lai Ngoh & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–03–49 OF 1996
GOPAL SRI RAM, NH CHAN AND ABU MANSOR JJCA
20 MAY 1997

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Civil Procedure *— Injunction — Mareva injunction — Dissipation of assets, risk of — Whether serious risk of dissipation of assets proven — Injunction not to be used as an instrument of oppression — Whether on balance of convenience injunction was wrongly denied*

C ***Evidence*** *— Fresh or further evidence — On appeal — Interlocutory matters — Whether court ought to allow motion to admit documents by way of further evidence — Whether the conditions stipulated in Ladd v Marshall [1954] 3 All ER 745 was applicable where there was no trial on merits*

D The hearing before the Court of Appeal concerned the High Court's refusal to grant the appellant a Mareva injunction. Another hearing before the High Court concerning the same parties was decided in *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367.

The appellant raised two issues in the present appeal: (i) whether the appellant had established that there was a serious risk or danger E that the respondents would dissipate their assets to avoid meeting any judgment obtained against them; and (ii) whether the balance of convenience lay in favour of the respondents and hence the correctness in refusing to grant the Mareva injunction.

Three motions were also heard before the court. The first two F motions were unopposed and thus the orders sought were granted. The third motion was taken by the first respondent to admit three documents by way of further evidence to show repayment. The appellant opposed the motion by stating that the requirements laid down in *Ladd v Marshall* [1954] 3 All ER 745 ('the *Ladd v Marshall* test') had not been met.

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Held, dismissing the appeal:

(1) The third motion was allowed. The appellant's submission that the *Ladd v Marshall* test applied was wrong as it clearly overlooked *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 55, which ruled that *Ladd v Marshall* did not H apply where there had been no trial or hearing on the merits of the case. As the present case was an interlocutory matter, *Ladd v Marshall* did not apply. The respondent's motion was granted (see p 169E); *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 followed.

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(2) The High Court was correct when it ruled that the appellant had failed to show there was a serious risk of the respondents dissipating their assets. Therefore, the High Court had correctly

exercised its discretion in refusing to grant a Mareva injunction on the balance of convenience (see pp 169G and 170A,C).

(3) There was an additional reason in support of the High Court's refusal to grant the injunction based on the fact that the second respondent gave the appellant a RM5m guarantee, which the latter accepted. It would be unjust and inequitable to impose a further restraint upon the respondents in the light of this guarantee. The Mareva injunction should not be used as an instrument of oppression (see p 170G–I); *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 followed.

(4) The appellant had failed to discharge the burden imposed upon him by law by establishing the circumstances that entitled appellate interference. On the contrary, the learned judge had exercised his discretion correctly and in accordance with settled principles. He appreciated the evidence judicially, took into account all relevant considerations and directed himself accurately upon the relevant law (see p 172B); *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191 followed.

[Bahasa Malaysia summary

Pembicaraan di Mahkamah Rayuan adalah berkenaan dengan penolakan Mahkamah Tinggi untuk memberikan injunksi Mareva kepada perayu. Perbicaraan lain di Mahkamah Tinggi yang melibatkan pihak-pihak yang sama telah diputuskan dalam *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367.

Perayu menimbulkan dua isu di rayuan ini: (i) sama ada perayu telah membuktikan bahawa terdapat risiko atau bahaya yang serius yang penentang akan melesapkan aset-aset mereka untuk mengelakkan daripada membayar apa-apa penghakiman yang diperolehi terhadap mereka; dan (ii) sama ada imbangan kesenangan berpihak kepada penentang dan oleh itu ketepatan penolakan untuk memberikan injunksi Mareva.

Tiga usul juga dibicarakan di hadapan mahkamah. Dua usul yang pertama tidak dibantah dan oleh itu perintah-perintah yang dipohon diberikan. Usul yang ketiga telah diambil oleh penentang pertama untuk memasukkan tiga dokumen dengan cara keterangan lanjut untuk menunjukkan pembayaran balik. Perayu membantah usul itu dengan menyatakan bahawa keperluan-keperluan yang ditetapkan dalam *Ladd v Marshall* [1954] 3 All ER 745 ('ujian *Ladd v Marshall*') tidak dipenuhi.

Diputuskan, menolak rayuan:

(1) Usul ketiga dibenarkan. Hujah perayu bahawa ujian *Ladd v Marshall* terpakai adalah salah kerana ia dengan jelasnya tidak mengambil kira *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 55, yang memutuskan

bahawa *Ladd v Marshall* tidak terpakai di mana tiada perbicaraan atau pembicaraan atas merit kes. Oleh kerana kes ini adalah perkara interlokutori, *Ladd v Marshall* tidak terpakai. Usul penentang dibenarkan (lihat ms 169E); *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 diikut.

(2) Mahkamah Tinggi adalah betul apabila ia memutuskan bahawa perayu telah gagal untuk menunjukkan terdapat risiko bahawa penentang akan melesapkan aset-aset mereka. Oleh itu, Mahkamah Tinggi telah melaksanakan budi bicaranya dengan betul dalam menolak pemberian injunksi Mareva atas imbangan kesenangan (lihat ms 169G dan 170A,C).

(3) Terdapat alasan tambahan dalam menyokong penolakan Mahkamah Tinggi untuk memberikan injunksi itu berdasarkan fakta bahawa penentang kedua memberikan kepada perayu RM5 juta gerenti, yang diterima oleh perayu. Adalah tidak adil dan saksama untuk mengenakan halangan lanjut ke atas penentang memandangkan gerenti ini. Injunksi Mareva tidak patut digunakan sebagai alat untuk menindas (lihat ms 170G–I); *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 diikut.

(4) Perayu telah gagal untuk melepaskan beban yang dikenakan ke atasnya oleh undang-undang dengan membuktikan keadaan-keadaan yang melayakkan campur-tangan Mahkamah Rayuan. Sebaliknya, hakim yang arif telah melaksanakan budi bicaranya dengan betul dan mengikut prinsip mantap. Beliau meneliti keterangan dengan adil, mengambil kira kesemua pertimbangan yang relevan dan mengarahkan dirinya dengan tepat berkenaan dengan undang-undang yang relevan (lihat ms 172B); *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191 diikut.]

Notes

For cases on Mareva injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1662–1697.

For cases on fresh or further evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 975–1003.

Cases referred to

Hadmor Productions Ltd & Ors v Hamilton & Anor [1983] 1 AC 191 (folld)

Ladd v Marshall [1954] 3 All ER 745 (refd)

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (refd)

Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor [1996] 3 MLJ 367 (refd)

Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605 (folld)

William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555 (folld) A

Appeal from: Suit No 22–147 of 1996 (High Court, Shah Alam)

Wong Chong Wah (*Leong Wai Hung* and *Lim Koon Hiam* with him) (*Skrine & Co*) for the appellant. B

N Navaratnam (*Logan Sabapathy & Co*) for the first respondent.

C Abraham (*RS Nathan* with him) (*Shearn Delamore & Co*) for the second respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): The facts and background relevant to this case have already been set out in the judgment of this court in an earlier appeal by the same appellant. See, *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367 ('*Medan Juta No 1*'). We do not propose to engage in a repetition of them. Suffice to say that the earlier appeal concerned the High Court's decision to remove the caveats entered by the instant appellant while the present case concerns the refusal by the same court to accede to the appellant's application for a Mareva injunction. This court, in the course of its judgment in *Medan Juta No 1*, adverted to the present appeal (see [1996] 3 MLJ at p 383). C D

It is conceded by the respondents (the second respondent being Medan Juta Sdn Bhd) that the appellant had made out an arguable case for the grant of a Mareva. There are several issues upon which the disputants before us stand in disagreement. However, we find it necessary to deal with only two of them. The first has to do with the question whether the appellant has established that there is a serious risk or danger that the respondents will dissipate their assets to avoid meeting any judgment that may be obtained against them. The second relates to the question where the balance of convenience or, more appropriately, the balance of justice lies. In other words, whether justice favours the grant of a Mareva or its refusal. Before we address ourselves to the resolution of this question, there are some preliminary matters that call for attention. E F

In addition to the appeal, there were before us three motions. Two of these were taken out by the appellant. The first was to amend the notice of appeal; the second, sought to admit, as further evidence, the affidavit of the first respondent filed in this court in *Medan Juta No 1* pursuant to a direction made therein. Both these motions were unopposed and the orders sought in each of them were granted. G H

The third motion was taken out by the first respondent seeking to admit three documents by way of further evidence to show repayment. It was opposed by the appellant on the ground that the test laid down in *Ladd v Marshall* [1954] 3 All ER 745 had not been met. *Ladd v Marshall* was referred to and applied by the former Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 where Suffian FJ (as he then was) stated the requirements in this way (at p 71): I

> To justify the reception of further evidence, three conditions must be fulfilled:

A First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;

Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

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Now, it must be borne in mind that the *Ladd v Marshall* test applies to cases where further evidence is sought to be admitted at the appellate level after a trial on merits. It does not apply to interlocutory matters. This is made clear by the judgment of Gunn Chit Tuan SCJ (as he then was) in *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555, where, when delivering the unanimous decision of the Supreme Court, he said (at p 557):

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> Firstly, in so far as the said notice of motion was concerned, we consider that the conditions laid down in *Ladd v Marshall* regarding the strict approach for fresh evidence to be admitted on appeal only applies where there has been a trial or hearing on the merits. But where there has not been a trial or hearing on the merits as in this case, the *Ladd v Marshall* conditions do not apply. But this court has in any case a full and general discretion whether to admit fresh evidence.

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E The present appeal comes well within the purview of the exception to the *Ladd v Marshall* test. The submission by En Wong Chong Wah of counsel for the appellant that the test applies notwithstanding that this is an interlocutory appeal plainly overlooks the decision in *William Jacks*. We entertained no difficulty in rejecting it and granting the orders sought by the first respondent in its motion.

F With that, we now turn to deal with the substantive merits of the appeal and to address the two issues argued before us.

So far as the first issue is concerned, the learned judge found that the appellant had failed to establish that there was a real danger that the respondents will dissipate assets in order to avoid meeting any judgment that may be obtained against them. This is how he put it:

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> After a proper perusal of all the affidavits filed herein, I find that there is absolutely no evidence of any other danger of dissipation of the defendants' assets.
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> The commercial relationship between the plaintiff and the defendants has subsisted for many years. The debt claimed as due arises from remittance to the first defendant that took place in 1991, 1992 and 1993. Since that time, the first defendant has been actively involved in business in Malaysia and there is no evidence at all to suggest that Jessie intends to liquidate her business interests.

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I There must be a serious risk of dissipation. Bare assertions that the second defendant is likely to put any asset beyond the plaintiff's grasp and is unlikely to honour any judgment or award are clearly not enough by themselves: *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG ('The Niedersachsen')* [1984] 1 All ER 398 at p 417, per Kerr LJ.

In our judgment, the learned judge was entirely correct in the approach he adopted. We too have scrutinized the affidavits, in particular, those parts of the evidence drawn to our attention by En Wong Chong Wah during his submissions. Having done thus, we have arrived at the same conclusion as the learned judge. We are therefore satisfied that there was no misdirection either on the evidence or the law by the learned judge. As such, we find ourselves unable to agree with the criticism levelled by En Wong against the judge's conclusion on the first issue.

Turning to the second issue, it is to be noted that the learned judge, after weighing all relevant factors, came to the conclusion that the balance of convenience lay in favour of refusing a Mareva. He said:

> Damages are an adequate remedy to the plaintiff as he will be in a position to quantify his claim in money terms if it is found at trial that the first defendant was a constructive trustee of his shares. However, the second defendant will be immobilized by the injunction and the damages suffered will not be readily quantifiable. As such, damages will not be an adequate remedy to the second defendant and the balance of convenience lies in favour of refusing the injunction.

The learned judge also took into account the plaintiff's ability to meet the undertaking in damages and made the following observation:

> The plaintiff has failed to show any evidence that his undertaking as to damages is of any worth. He has no assets in this jurisdiction to justify any meaningful offer to account of security for costs including the costs awarded against him in the caveat proceedings. This is yet another factor that militates against the granting of the Mareva injunction in his favour. See *Sykt Promine Dungun Sdn Bhd v Perbadanan Memajukan Iktisad Negeri Terengganu* [1990] 2 MLJ 18.

Again, we are of the view that this is eminently a correct direction by the learned judge of himself upon the law and the facts. We have taken into account the fresh evidence adduced before us but find that it does not assist the appellant. On the other hand, we find that there is an additional reason in support of the learned judge's refusal of the injunction.

It is beyond dispute that the appellant, on 23 January 1996 accepted a guarantee in the sum of RM5m secured by the instant second respondent from Perdana Merchant Bankers Bhd. The terms of that guarantee and the circumstances in which it was given and accepted appear sufficiently in the judgment of this court in *Medan Juta No 1*. No useful purpose will be served by their regurgitation. Suffice to say that the appellant having accepted the guarantee, it would be unjust and inequitable to impose a further restraint upon the respondents. A court should always be careful to ensure that the Mareva form of relief is not used as an instrument of oppression (see *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605).

At the end of the day, this is really an appeal against the exercise of discretion by the judge. In cases such as the present instance, we can do no better than recall to mind the words uttered by Lord Diplock during his

speech in *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191 at p 220:

> Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction, the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.
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> In the instant case, no deference was paid, no reference was even made, to the reasons given by Dillon J for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR of why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal, both sides had adduced further evidence 'so virtually we have to consider it all afresh'.
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> My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do, is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case, the additional evidence, so far from

invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions. A

The appellant has failed to discharge the burden imposed upon him by law by establishing those circumstances that entitle appellate interference. On the contrary, we are satisfied that the learned judge exercised his discretion correctly and in accordance with settled principles. He appreciated the evidence judicially, took into account all relevant considerations and directed himself accurately upon the relevant law. B

For the reasons given, we dismissed the appeal. The orders made by the learned judge were affirmed. The appellant was ordered to bear all the costs occasioned by this appeal and the deposit paid into court was directed to be paid out to the respondents to account of their taxed costs. An order for early trial was also made. C

Appeal dismissed.

Reported by K Tang-Wai D

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